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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-465

In the Matter of
TRANSOCEAN TERMINALS, INC., Bankrupt.

DEWAYNE F. TITUS, *Petitioner,*

vs.

IRVING J. KORNFIELD, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

In the Matter of
TRANSOCEAN TERMINALS, INC., Bankrupt.

DEWAYNE F. TITUS, *Petitioner,*

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IRVING J. KORNFIELD, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

DeWayne F. Titus, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 18, 1973.

OPINION BELOW

The opinion of the Referee in Bankruptcy is unreported and a copy thereof is appended to this petition in the Appendix at p. ii.

The opinion of the District Court for the Northern District of California has not yet been reported. The opinion of the Court of Appeals for the Ninth Circuit has not yet been reported.

JURISDICTION

The judgment of the District Court for the Northern District was made and entered on January 13, 1971 and a copy thereof is appended to this petition in the Appendix at p. vi. The judgment of the Court of Appeals for the Ninth Circuit was made and entered on June 18, 1973, and a copy thereof is appended to this petition in the Appendix at p. i. The jurisdiction of this Court is invoked under 11 U.S.C., Section 47(c) and 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

The questions presented are:

1. Whether a Referee in Bankruptcy may take judicial notice of the contents of his file without request therefor or notice to the party against whom the matter is to be used and without giving said party any opportunity to object thereto, or explain, or refute the effect thereof, or present what defenses

or evidence he may have concerning the validity or effectiveness of the evidence, facts, or documents to be so judicially noticed.

2. Whether a party to a controversy in a proceedings in bankruptcy is entitled to have matters therein determined according to procedural due process.

3. Whether a party to a proceedings can be deemed to have admitted the allegations in an application when he timely placed his answer properly addressed with postage prepaid in the United States mail and which was received late by the Court due to a late delivery by the United States Post Office.

4. Whether a judgment may be entered under Rule 8 of the Federal Rules of Civil Procedure for breach or failure to perform a contract or agreement when no damages have been alleged and no evidence of damages has been received.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision which is relevant to decision of this case is Amendment V of the United States Constitution which provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT

In a controversy in a proceedings in bankruptcy a settlement agreement was entered into and was filed with and approved by the Referee in Bankruptcy. The settlement agreement did not contain any consent to or provision for the entry of any judgment against Petitioner. However, the Referee, without application or request, without notice to Petitioner, hearing or opportunity to be heard, made and entered a judgment upon said settlement agreement against Petitioner for $300,000.00. Petitioner filed a timely petition to review said judgment whereupon the Referee made and entered a supplemental judgment for said amount against Petitioner. Again there was no application or request for the supplemental judgment, no notice or hearing or opportunity for Petitioner to be heard. Petitioner also filed a timely petition to review the supplemental judgment. While these reviews were pending Respondent filed an application for judgment which was set for hearing on notice to Petitioner. Petitioner, through his attorney, whose office is in Fresno, some two hundred miles from Oakland, California, where the Referee's office is located, prepared "Objections to Jurisdiction and Answer and Response to Application for Judgment" and deposited it in the United States mail, properly addressed to the Referee with postage prepaid on February 13, 1971, five days before the hearing on said application. Attorneys to whom copies of the answer were mailed received their copies before the noticed hearing. The Referee's records show that he

received his copy after the hearing. As previously stated, the Post Office was late in delivering the original to the Referee's office.

Both parties appeared at the hearing upon Respondent's application for judgment. Petitioner renewed his objection to the Referee's summary jurisdiction and argued that under the case of *Sumida v. Yumen,* 409 F.2d 654, 9 Cir. 1964, the Referee had lost jurisdiction over the matter at the time Petitioner filed his petitions to review the first judgment and the supplemental judgment that had been entered by the Referee. Except for argument by both sides on the issue of jurisdiction nothing else transpired at said hearing. No witnesses were called, no testimony was taken, no exhibits or documents were offered or received. No request that the Referee judicially notice the settlement agreement in his file or any other fact or document was made. On February 19, 1971, the day after the hearing, the Referee made and entered a third judgment entitled "Corrected Judgment" for $300,000.00 against Petitioner. Upon review and appeal the District Court and the Court of Appeals for the Ninth Circuit affirmed the Corrected Judgment rendered by the Referee.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the decision of the District Court, which was affirmed by the Circuit Court of Appeals for the Ninth District, without additional decision of its own, holds that "the

Referee was not limited to a consideration of the evidence presented at the February 18, 1970 hearing" but "He was required to, and did, consider the entire bankruptcy proceeding in reaching his decision, even though other parts of the proceeding were not referred to at the hearing." In other words, that the Referee can take judicial notice of his entire file and facts not presented at the hearing without request therefor, or notice to the party against whom they are to be used. This is in conflict with the decision of the Court of Appeals for the Third Circuit, on the same matter, in the cases of *In re Aughenbough* (3 Cir.) 125 F.2d 887, 889, 890, and *In re Lenrick Sales, Inc.* (3 Cir.), 369 F.2d 439, 442. (See 5 Moore's Federal Practice, Section 4309, at pp. 1371-1372 and IX *Wigmore on Evidence* (3rd Ed.) Section 2568, pp. 536-537.)

The decision should be reviewed because Petitioner has had a judgment rendered against him without a fair hearing and without compliance with the basic requirements of due process. (This case will authorize such procedure in the Ninth Circuit.) This decision involves an important question of federal law concerning proper procedure and the basic requirements of procedural due process in matters heard by Bankruptcy Courts. It should be made clear that the basic requirements of due process as laid down by this Court in *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 949; *Morgan v. U.S.* (Mo. 1938) 58 S.Ct. 373, 304 U.S. 1, 82 L.Ed. 1129; rehearing denied, 58 S.Ct. 999, 304 U.S. 1, 82

L.Ed. 1129; and as set forth in *U.S. v. Dillman* (C.C.A., Tex. 1945) 146 F.2d 572, 574, certiorari denied, 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989, and other cases involving this matter should be applicable to the determination of controverted matters in bankruptcy proceedings.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, Fresno, California,
September 4, 1973.

W. A. McGugin,
Gordon Nelson,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

In the Matter of Transocean Terminals, Inc., Bankrupt. Dewayne F. Titus, Appellant, vs. Irving J. Kornfield, Trustee-Appellee.	No. 71-2035 ORDER OF AFFIRMANCE

[June 18, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, KOELSCH and CARTER, Circuit Judges

PER CURIAM:

There being no reversible error in the Order of the United States District Judge, pursuant to 11 U.S.C. §67(c), denying on February 19, 1970, Dewayne Titus' Petition for Review of the "Corrected Judgment" of the Referee in Bankruptcy, the said order and judgment be, and the same are,

Affirmed.

In the United States District Court
for the Northern District of California

In Bankruptcy
No. 110194

In the Matter of
Transocean Terminals, Inc.,
a corporation,
Bankrupt.

CORRECTED JUDGMENT

The Application for Turnover Order and Order Disregarding Corporate Entities filed in the above-named bankruptcy proceeding on October 17, 1969, by Irving J. Kornfield, Trustee in Bankruptcy herein, and the Amended Application for Turnover Order and Order Disregarding Corporate Entities filed herein on November 7, 1969, by Irving J. Kornfield as Trustee in Bankruptcy herein, having come on regularly for hearing before this Court at various times, and one of the respondents, DeWayne F. Titus, having entered into a settlement agreement regarding said Trustee's applications which was filed herein on November 26, 1969, and said settlement agreement having been approved by an Order Approving Compromise of this Court filed herein on November 26, 1969, and this Court having made its Order giving said

Trustee judgment against said DeWayne F. Titus in the sum of Three Hundred Thousand Dollars ($300,000.00) by Order dated December 9, 1969, and said Order having been modified by Order Supplementing Trustee's Judgment against DeWayne F. Titus dated February 6, 1970, which said Order of February 6, 1970, was made at the behest of counsel for said DeWayne F. Titus and incorporated language suggested by said counsel for DeWayne F. Titus, and said counsel for said Titus having asserted that the Order of this Court of December 9, 1969, was not made after due notice of hearing thereof; and

Irving J. Kornfield, Trustee in Bankruptcy herein, having filed herein his verified Application for Judgment dated February 6, 1970, and this Court having issued its Order to Show Cause thereon dated February 9, 1970, this Court finds that said Order to Show Cause was duly and properly served in the manner therein provided and this Court further finds that on February 18, 1970, pursuant to stipulation of counsel for said DeWayne F. Titus made in open Court, said DeWayne F. Titus being personally present at the time, the hearing upon said Application for Judgment dated February 6, 1970, and upon the Order to Show Cause issued thereon and dated February 9, 1970, was advanced to said time and place; and

Said application and Order to Show Cause being then heard and arguments made, counsel for applicant Trustee in Bankruptcy and counsel for DeWayne F.

Titus, as well as DeWayne F. Titus himself, being present, and the matter submitted;

This Court finds that each and all of the allegations of the verified Application for Judgment dated February 6, 1970, are true and correct and concludes that the Trustee in Bankruptcy should have judgment against DeWayne F. Titus as hereinafter provided.

It Is Therefore Ordered that the Judgment of this Court entered December 9, 1969, in favor of Trustee Irving J. Kornfield and against DeWayne F. Titus in the amount of Three Hundred Thousand Dollars ($300,000.00), as well as the Order Supplementing Trustee's Judgment against DeWayne F. Titus entered February 6, 1970, are each vacated and set aside.

It Is Further Ordered, Adjudged and Decreed that Irving J. Kornfield as Trustee in Bankruptcy of Transocean Terminals, Inc., a corporation, Bankrupt, have judgment against DeWayne F. Titus in the sum of Three Hundred Thousand Dollars ($300,000.00).

It Is Further Ordered that whenever Titus has fully satisfied his obligation by way of paying to the Trustee the full sum of $300,000.00, or Trustee has secured payment by way of levy of execution against said Titus, that said fund be used to satisfy all allowed claims and costs in this proceedings and, pursuant to said settlement agreement, any final judgment against Titus which may be secured by the Trustee of the bankrupt estate of Christian & Porter Aluminum Company, and any funds still remaining be returned to Titus.

It Is Further Ordered that should any such surplus remain after the making of the above payments, any such surplus funds shall be the property of said Titus and shall in no manner be considered as surplus assets payable to Gust C. Nichandros, or any other stockholder or owner of the bankrupt Transocean Terminal, Inc.

It Is Further Ordered that pursuant to Rule 52(a) of the Federal Rules of Civil Procedure this Order shall constitute final Order of this Court and no further findings nor conclusions need be filed.

Dated: February 19, 1970.

Sheridan Downey, Jr.
Referee in Bankruptcy

In the United States District Court
Northern District of California

In Bankruptcy
No. 110194

In the Matter of
Transocean Terminals, Inc.,
Bankrupt.

MEMORANDUM AND ORDER DENYING DEWAYNE TITUS' PETITION FOR REVIEW

This matter comes before the Court on Titus' Petition for Review of the Referee in Bankruptcy's Corrected Judgment of February 19, 1970, and a further Amended Petition for Review of said Corrected Judgment. Titus raises several issues which are disposed of as follows:

1. This Court's Order of March 11, 1970, entered into by agreement of the parties thereto, determined that the December 9, 1969 Judgment, and the February 6, 1970 Order, which were vacated pursuant to the Order of Corrected Judgment of February 19, 1970, were vacated pursuant to due process of law. Thus, Titus thereby waived his claim that the Referee had no authority or jurisdiction to render the Corrected Judgment while a petition to review the initial judgment was pending.

2. The issue of whether Transocean Terminals, Inc. was properly adjudicated a bankrupt is not ap-

propriate for consideration at this time. The Referee's Order Adjudicating Debtor a Bankrupt was entered on October 17, 1969. Section 39(c) of the Act requires a person aggrieved by an order of a referee to file a petition for review of that order within ten days of the entry thereof. Unless such a petition is timely filed, the order of the referee becomes final. 11 U.S.C. §67(c). For the same reason, Titus cannot at this time challenge the validity of the settlement agreement. On November 26, 1969, the Bankruptcy Court entered an order approving the settlement agreement. A petition for review of this order should have been filed within ten days thereafter. Hence, this Court cannot disturb the referee's order of November 26, 1969, under the present petition for review.

3. Titus' assertion that the Corrected Judgment is deficient because he did not have an opportunity to be heard thereon must fail. In the reporter's Partial Transcript of the Hearing on Supplement to Judgment on February 18, 1970, Titus' counsel, W. A. McGugin, stipulated that the matter be heard at that time. Furthermore, the referee provided McGugin ample opportunity to state any arguments concerning the supplemental order. It would have been appropriate for McGugin to have raised the question of whether the Central Valley National Bank loan to Titus was a condition precedent to the effectiveness of the settlement agreement. The transcript clearly shows, however, that McGugin chose to discuss only the issue of the referee's jurisdiction.

4. Titus' charge that the findings of fact of the Corrected Judgment were not supported by evidence before the referee is without merit. A finding of fact of a Referee in Bankruptcy must be adhered to unless it is clearly erroneous. General Order in Bankruptcy No. 47; *Flaxman, Coleman, Gireman & Rosoff v. Cheek,* 355 F.2d 672 at 674 (9th Cir. 1966).

In judging the validity of the allegations of the Trustee's Application for Judgment dated February 6, 1970, the referee was not limited to a consideration of the evidence presented at the February 18, 1970, hearing. He was required to, and did, consider the entire bankruptcy proceeding in reaching his decision, even though other parts of the proceeding were not referred to at the hearing. *DeMet v. Harralson,* 399 F.2d 35, 39 (5th Cir. 1968); *In re Ira Haupt & Co.,* 398 F.2d 607, 612 (2d Cir. 1968). The findings in the Corrected Judgment of February 19, 1970, were that the allegations in the February 6, 1970, Application for Judgment were true and correct. Having reviewed the bankruptcy proceedings, this Court is satisfied that said findings are supported by sufficient evidence, and that they are not clearly erroneous.

Therefore, the Petition for Review of Dewayne Titus from the Corrected Judgment of February 19, 1970, is denied, and said judgment is hereby confirmed.

Dated: Jan 13 1971

/s/ Robert F. Peckham
United States District Judge

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In the Supreme Court
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OCTOBER TERM, 1973

No.

In the Matter of
TRANSOCEAN TERMINALS, INC., Bankrupt.

DEWAYNE F. TITUS, *Petitioner,*

VS.

IRVING J. KORNFIELD as Trustee in Bankruptcy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Irving J. Kornfield, as Trustee in Bankruptcy of Transocean Terminals, Inc., respondent herein, prays that this Court deny the petition by DeWayne F. Titus for the issuance of a Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit to review that court's decision rendered in this cause on June 18, 1973.

OPINION BELOW

The opinion delivered in the court below is not reported, but is appended to the Petition for Writ of Certiorari at page i of that Appendix.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

The only real question before the Court is whether the Court of Appeals was correct in holding that there was no reversible error in the January 13, 1971 Order of the District Court on Review (Petitioner's Appendix vi-viii) which Order received the February 19, 1970 Judgment of the Referee in Bankruptcy (Petitioner's Appendix ii-v).

Petitioner's designation of question numbered (1) in his petition regarding the taking of judicial notice by a Referee in Bankruptcy of the court's file is a false issue in that said issue was raised for the first time before the Court of Appeals by the petitioner,

and the respondent in that court stated as he does here that the issue is irrelevant because the respondent at no time requested the trial court to take judicial notice of anything and the court did not rely on the doctrine of judicial notice as a ground for its judgment.

Petitioner's question designated number (2) presents a question which answers itself—a party to a bankruptcy proceeding is most certainly entitled to be accorded procedural due process—the real query is whether such due process was denied petitioner in this case especially in light of the fact that he stipulated on at least one occasion that he was afforded due process.

Petitioner's question designated number (3) poses a question which presupposes a factual basis that was totally absent from and unsupportable by the record on appeal before the Court of Appeals, to wit: that petitioner timely placed his responsive pleading to the Trustee in Bankruptcy's application in the United States mails but that it was received by the Trial Court subsequent to trial.

Petitioner's question designated number (4) chooses to mislead this Court in that the Judgment entered below against the petitioner effectively directs specific performance of the agreement breached by the petitioner.

RULES INVOLVED

General Order in Bankruptcy Number 37 as adopted by this Court provides:

> In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding.

Rule 10(c) of the *Federal Rules of Civil Procedure* provides in part relevant hereto as follows:

> A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rule 8(d) of the *Federal Rules of Civil Procedure* provides in part relevant the following:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Rule 403(c) of the *Local Rules of Practice of the United States District Court for the Northern District of California* in part relevant provides:

> **(c) Response to Proceeding.** Any respondent who wishes to contest a proceeding against him shall file a written response and serve a copy thereof not later than 5 days prior to the date of the hearing unless otherwise ordered. If a writ-

ten response is not filed, the court may enter the default of the respondent.

STATEMENT OF THE CASE

On November 26, 1969, a Settlement Agreement among petitioner, respondent and others was entered into. A true and correct copy of same appears as Appendix A hereto.

The Settlement Agreement in part relevant hereto provided the following:

> 1. That said DeWayne F. Titus agrees to deliver and turn over to Irving J. Kornfield the sum of Three Hundred Thousand Dollars ($300,000.00) as hereinafter provided to be used for the payment of such claims of Transocean Terminals, Inc., as may be properly filed and allowed by order of the above-entitled Court in these proceedings, costs of administration, including all attorneys fees for the creditors' committee and for attorneys fees for said trustee together with their costs. Said sum of Three Hundred Thousand Dollars ($300,000.00) shall be the maximum limit of liability of DeWayne F. Titus and said corporate respondents to the said trustee, Irving J. Kornfield, and the bankruptcy estate of Transocean Terminals, Inc. Said DeWayne F. Titus and said corporate respondents shall have no further or other liability to said trustee or said bankruptcy estate over and above the said sum of Three Hundred Thousand Dollars ($300,000.00), when said sum is delivered by DeWayne F. Titus to said Irving J. Kornfield, trustee.

2. That said DeWayne F. Titus further agrees to pay over and deliver, upon determination of the amount thereof, if any, by the above-entitled Court to Kerry M. Gough, receiver in the above-entitled Christian and Porter Aluminum Company, bankruptcy proceedings, or to said Gough's legal successor in said proceeding, a cash fund sufficient to pay and satisfy in full any and all claims, obligations or liabilities that the above-entitled Court may find said DeWayne F. Titus or any of the above-named corporate respondents may have to said receiver of the bankruptcy estate of said Christian & Porter Aluminum Co., directly or indirectly as an alter ego of said Christian & Porter Aluminum Co., it being specifically understood and agreed that the validity of any such claims, obligations, or liabilities shall be fixed and determined by the Bankruptcy Court after due hearing upon notice to the parties hereto.

* * *

10. It is agreed, anything herein to the contrary notwithstanding, that DeWayne F. Titus shall deliver said Three Hundred Thousand Dollars ($300,000.00) to Irving J. Kornfield as follows:

(a) The sum of Two Hundred Thousand Dollars ($200,000.00) within ten (10) days from the date of the order of the above-entitled Bankruptcy Court approving his settlement agreement. That time is of the essence hereof and, due to said outstanding restraining orders, said DeWayne F. Titus and said corporate respondents require as a special condition herein that this agreement be approved or disapproved by said Court without the delay required by notice to creditors in

either of the said Transocean Terminals, Inc., or said Christian & Porter Aluminum Co. bankruptcy proceedings.

(b) The sum of One Hundred Thousand Dollars ($100,000.00) within thirty (30) days from the date of said order approving this agreement. Should DeWayne F. Titus fail to deliver the sum of One Hundred Thousand Dollars ($100,000.00) to said trustee within thirty (30) days from the date of said order it is agreed that said outstanding restraining orders heretofore issued in said two bankruptcy estates may be reissued against said DeWayne F. Titus and said corporate respondents and remain in effect until said DeWayne F. Titus shall have complied with the provisions of paragraphs 1(a) and 1(b) hereof or said sum of One Hundred Thousand Dollars ($100,000.00) is deposited with said trustee.

It is agreed by said trustee, upon receipt of said sum of money, shall cause the same to be deposited in an interest bearing account or converted into certificates of deposit so that said funds shall be earning interest while being held by said trustee. Any interest so earned shall become a part of such funds for the purposes of this agreement.

The Settlement Agreement was approved by the Referee in Bankruptcy by Order entitled "Order Authorizing and Approving Compromise of Controversies" entered in the bankruptcy proceeding on November 26, 1969. A true and correct copy of said Order appears as Appendix B hereto.

Petitioner failed to make any payments pursuant to the terms of the Settlement Agreement, or at all.

On February 9, 1970, respondent as Trustee in Bankruptcy filed in the bankruptcy proceeding his Application for Judgment alleging that petitioner had entered into the aforementioned Settlement Agreement and had failed to perform its terms and prayed for judgment against the petitioner to enforce the provisions of the Agreement. A true and correct copy of the application appears as Appendix C hereto. Attached as exhibits to the application and incorporated by reference therein were the Settlement Agreement and the Order approving same (Appendixes A and B attached hereto).

The court pursuant to said Application on February 9, 1970 issued its Order to Show Cause directing petitioner to appear before the Trial Court and show cause why the relief prayed for should not be granted. A true and correct copy of said Order to Show Cause appears as Appendix D hereto.

After due service of the aforementioned Application and Order to Show Cause the matter came on for hearing and the petitioner herein failed to file a responsive pleading with the court by that time.

At the hearing petitioner's attorney agreed that $300,000.00 was to be deposited with the respondent as security and to be used for the payment of creditor claims and costs of administration in the bankruptcy proceeding pursuant to the Settlement Agreement. He further admitted that the petitioner had paid nothing and that the respondent had performed all duties required by him under the Settlement Agreement.

The Trial Court entered Judgment on February 19, 1970, against petitioner in conformance with the terms of the Settlement Agreement. A true and correct copy of the Judgment is affixed as Appendix ii to petitioner's petition herein.

Appeal to the Circuit Court followed giving rise to the June 18, 1973 Order of that Court affirming the Order of the District Court (Appendix i of petitioner's petition).

Petitioner's allegation in his petition herein (at page 4) that two prior judgments were entered against him is misleading in that both judgments were vacated pursuant to requests of petitioner and it was stipulated by the petitioner as evidenced by the March 11, 1970 order of the District Court which is Appendix E, that said judgments were vacated pursuant to due process of law (See page 2, last paragraph, and page 4, last full paragraph, of said Order —Appendix E).

ARGUMENT

THE COURT OF APPEALS PROPERLY AFFIRMED THE DECISION OF THE DISTRICT COURT AFFIRMING THE JUDGMENT ENTERED AGAINST DeWAYNE F. TITUS BECAUSE THE TRIAL COURT JUDGMENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A finding of fact of a Referee in Bankruptcy must be adhered to unless it is found to be "clearly erroneous". (See General Order in Bankruptcy No. 47; *Flaxman, Coleman, Gorman and Rosoff v. Cheek*, 355 F. 2d 672 at 674 [9th Cir.-1966]; *O'Hagan v. Blythe,*

354 F. 2d 83 at 84 [2nd Cir.-1965] and *Tepper v. Chichester,* 285 F. 2d 309 at 312 [9th Cir.-1960]).

The Referee in his corrected Judgment found that:

> [E]ach and all of the allegations of the verified Application for Judgment dated February 6, 1970, are true and correct and concludes that the Trustee in Bankruptcy should have judgment against DeWayne F. Titus as hereinafter provided. (First full paragraph of page iv of petitioner's Appendix).

And the allegations of the Application for Judgment of February 6, 1970 (Appendix C attached hereto) were as follows:

> That applicant is the duly qualified, appointed and acting Trustee in Bankruptcy of the above estate;
>
> That on November 26, 1969, there was filed in these proceedings a Settlement Agreement, a true copy of which is attached hereto and marked "Exhibit A";
>
> That said Agreement was signed by DeWayne F. Titus and provided inter alia that said DeWayne F. Titus agreed to deliver and turn over to applicant the sum of Three hundred thousand ($300,000.00) Dollars for the purposes set forth in said Agreement as follows:
>
> > Two Hundred Thousand Dollars within ten days from the date of the order of this Court approving said agreement;
> >
> > One Hundred Thousand Dollars within thirty days from the date of said Order Approving said Agreement;

> That on November 26, 1969, this Court did make and file herein its Order Authorizing and Approving Compromise of Controversies, a true copy of which is attached hereto and marked "Exhibit B";
>
> That all material conditions, agreements and undertakings and conditions precedent by other persons than DeWayne F. Titus, his agents and attorneys provided for in said Settlement Agreement have been fully performed;
>
> That said DeWayne F. Titus has failed and refused to deposit or pay over to applicant any part of the Three Hundred Thousand Dollars ($300,000.00) as provided in said Settlement Agreement.

The key question thus is whether adequate evidence was before the Referee upon which to make his finding that the allegations of the trustee's said Application were true and correct.

Rule 10(c) of the *Federal Rules of Civil Procedure* provides in part relevant hereto as follows:

> A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

The Settlement Agreement of November 6, 1969, was attached to the trustee's application as Exhibit "A".

Rule 8(d) of the *Federal Rules of Civil Procedure* provides as follows:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not de-

> nied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Although Rule 403(c) of the *Local Rules of Practice of the United States District Court for the Northern District of California* required Titus to file a written response to the trustee's Application, Titus failed so to do and thus the allegations of the trustee's Application are deemed admitted pursuant to F.R.C.P. 8(d) including the existence and execution of the Settlement Agreement attached to the trustee's Application as Exihibit "A".

A case directly in point is *Peoples Natural Gas Co. v. Federal Power Commission,* 127 F.2d 153 (C.A.D.C.—1942), cert. den. 316 U.S. 700, 62 S.Ct. 1298, 86 L.Ed. 1769 (1942) which held that an exhibit attached to a complaint was deemed admitted by failure to deny.

Also as referred to in the Statement of the Case, petitioner's attorney at the hearing on the Application for Judgment admitted that petitioner had not complied with the terms of the Settlement Agreement.

The discussion in petitioner's petition before this Court regarding the doctrine of judicial notice is not in point because the Trial Court in the case at bench took judicial notice of nothing but rather limited its inquiry to the evidence presented at the hearing on the merits including therein an examination of the Settlement Agreement in question which was attached

as an Exhibit to the Application for Judgment of the Trustee in Bankruptcy. As a consequence thereof there is absolutely no conflict between the decision rendered by the Lower Courts in this case with the Third Circuit decisions referred to on page 6 of petitioner's petition herein.

Petitioner's assertion in his petition that the judgment in the case at bench was entered against him without "a fair hearing and without compliance with the basic requirements of due process" is without merit. As hereinabove set forth in the Statement of the Case the judgments entered against the petitioner (with the exception of the February 19, 1970 corrected Judgment) were at the request of petitioner vacated and set aside by the Trial Court and petitioner subsequently stipulated that the vacating and setting aside of said judgments was done pursuant to due process of law. The judgment affirmed by the Court of Appeals was rendered after the filing and serving of an Application for Judgment, the issuance and serving of an Order to Show Cause, and a hearing before the Trial Court concerning same. Thus this writer fails to see the relevancy to the facts of the case at bench of the standards laid down by this Court in the case of *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 949 (1969).

CONCLUSION

For the reasons stated above, respondent says that a Petition for a Writ of Certiorari should be denied.

Dated, Oakland, California,
September 18, 1973.

Respectfully submitted,
MILTON MAXWELL NEWMARK,
LYNN ANDERSON KOLLER,
By LYNN ANDERSON KOLLER,
Counsel for Respondent.

JOHN M. THORPE,
Of Counsel.

(Appendices Follow)

Appendix A

In The United States District Court
Northern District Of California

In the Matter of Trans Ocean Terminals, Inc., a corporation, Bankrupt.	No. 110194 In Bankruptcy
In the Matter of Christian & Porter Aluminum Co., Bankrupt.	No. 111649 In Bankruptcy

[Filed November 26, 1969]

SETTLEMENT AGREEMENT

Whereas, the above entitled proceedings of Trans Ocean Terminals, Inc. was originally filed in the above entitled Court as a proceedings for an arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy, and an order was made and entered therein confirming an amended plan of arrangement and payment was made as required by the amended plan to all creditors whose claims were filed and allowed in said Chapter XI proceedings; and

Whereas, an application for orders vacating and setting aside all previous orders heretofore made in said proceedings and for the consideration ab initio of debtor's statement of affairs, schedules and execu-

tory contracts, after same are amended and corrected, was filed in the said proceedings of Trans Ocean Terminals, Inc. on September 30, 1969, and said matter was set for hearing and partially heard and, upon consent of Raymond Mushrush, one of the attorneys for Trans Ocean Terminals, Inc., an Order was made and entered on October 17, 1969, vacating the order confirming debtor's plan of arrangement and adjudicating debtor a bankrupt; and

Whereas, on said date of October 17, 1969, Irving J. Kornfield was appointed Trustee in Bankruptcy of said Trans Ocean Terminals, Inc. and said trustee on said date of October 17, 1969, filed an Application for a Turnover Order and Order Disregarding Corporates Entities, and an Order to Show Cause with Temporary Stay was issued by the above entitled court on said date, wherein Trans Ocean Export Packing, Inc., Barbary Coast Properties, Inc. D. J. Properties, Inc., Alameda Diversified Industries, National Building Components, Inc., Alameda Factors, Inc., Continental Consolidated, Inc., Transocean Enterprises, Inc., Pay Rolls, Inc., Aluminum Extruded Shapes, Inc., All American Machinery Co., Inc., California Western Trucking, Coast Corrigated Container, Inc., Christian & Porter, Inc., Harbor Steel, Inc., ABC Container, Inc., Pacific Wood and Metal, Bayshore Lift, Transocean Managing, Inc., and DeWayne F. Titus, were ordered to appear before the above entitled Court upon dates fixed in said Order to Show Cause to show cause why an order should not be made declaring said respondents to be the alter egos of each other and the alter egos

of DeWayne F. Titus, and that their separate entities be disregarded in the administration of said proceedings, and that said respondents be directed to turn over and render to said trustee any and all assets in their possession. That said respondents were by said Order restrained from transferring, encumbering and/or conveying any of their assets in aid of DeWayne F. Titus to hinder or delay the recovery of assets by said trustee, and to further show cause why said restraining order should not be kept in full force and effect pending a final determination upon the merits of the said application of said trustee for a turnover order, etc.; and

Whereas, Trans Ocean Terminals, Inc. filed with the above entitled Court on October 24, 1969 a Petition to Review said Order dated October 17, 1969, vacating the Order confirming the debtor's plan of arrangement and adjudicating the debtor a bankrupt; and

Whereas, each of said respondents, save and except Christian & Porter Aluminum, Inc., filed an Objection to Jurisdiction and Answer and Response to Application for Turnover Order and Order Disregarding Corporate Entities, together with a Motion to Dissolve the Restraining Order and dismiss the said Application of the trustee for a Turnover Order, Restraining Order, etc., together with a Motion for Change of Referee; and

Whereas, said Application of said trustee for a Turnover Order and Order Disregarding Corporate Entities came on for hearing on October 27, 1969,

and was partially heard on said date and was continued over for further hearing at a future date; and

Whereas, further applications have been filed, further orders to show cause have been issued, and further hearings have been set in the above entitled bankruptcy proceedings; and

Whereas, Kerry M. Gough, receiver in the above entitled bankruptcy matter of Christian & Porter Aluminum Co., has filed an Application for a Turnover Order and Order Disregarding Corporate Entities in the said bankruptcy proceedings of Christian & Porter Aluminum Co. and caused an Order to Show Cause to be issued thereon requiring each of said respondents to also appear before the above entitled Court to show cause why an order should not be made declaring that said respondents are the alter egos of each other and the alter egos of DeWayne F. Titus; that said separate entities be disregarded and that said respondents be directed to turnover and render to said receiver any and all assets in their possession; that said order to show cause also contains an Order restraining said respondents from transferring, encumbering and/or conveying any of their assets in aid of DeWayne F. Titus to hinder or delay the recovery of assets by said receiver, save and except transactions involving the sale of merchandise in the usual course of business; and

Whereas, said respondents are willing to stipulate and agree, as hereinabove set forth, provided such stipulation is made and entered into immediately

without any delay, and said trustee and receiver feel that it will be advantageous to their respective bankruptcy estates to so stipulate and agree;

Now, Therefore, It Is Hereby Stipulated and Agreed by and between said respondents, their attorneys, and said trustee and receiver, and their attorneys, subject to the authorization and approval of the above-entitled Court, as follows, to wit:

1. That said DeWayne F. Titus agrees to deliver and turn over to Irving J. Kornfield the sum of Three Hundred Thousand Dollars ($300,000.00) as hereinafter provided to be used for the payment of such claims of Transocean Terminals, Inc., as may be properly filed and allowed by order of the above-entitled Court in these proceedings, costs of administration, including all attorneys fees for the creditors' committee and for attorneys fees for said trustee together with their costs. Said sum of Three Hundred Thousand Dollars ($300,000.00) shall be the maximum limit of liability of DeWayne F. Titus and said corporate respondents to the said trustee, Irving J. Kornfield, and the bankruptcy estate of Transocean Terminals, Inc. Said DeWayne F. Titus and said corporate respondents shall have no further or other liability to said trustee or said bankruptcy estate over and above the said sum of Three Hundred Thousand Dollars ($300,000.00), when said sum is delivered by DeWayne F. Titus to said Irving J. Kornfield, trustee.

2. That said DeWayne F. Titus further agrees to pay over and deliver, upon determination of the amount thereof, if any, by the above-entitled Court

to Kerry M. Gough, receiver in the above-entitled Christian and Porter Aluminum Company bankruptcy proceedings, or to said Gough's legal successor in said proceeding, a cash fund sufficient to pay and satisfy in full any and all claims, obligations or liabilities that the above-entitled Court may find said DeWayne F. Titus or any of the above-named corporate respondents may have to said receiver or the bankruptcy estate of said Christian & Porter Aluminum Co., directly or indirectly as an alter ego of said Christian & Porter Aluminum Co., it being specifically understood and agreed that the validity of any such claims, obligations, or liabilities shall be fixed and determined by the Bankruptcy Court after due hearing upon notice to the parties hereto.

3. That said DeWayne F. Titus, by the signing of this agreement, does hereby agree that he will not assign, transfer or incumber any of his present stock interest in Continental Consolidated, Inc., a California corporation, save and except with pledge made with underwriting procedures for Continental Consolidated, Inc., stock, until final determination and payment of the amounts, if any, found due from said Titus and/or corporate respondents herein to the Christian & Porter Receiver or Trustee.

It is agreed that the sum of Three Hundred Thousand Dollars ($300,000.00) to be deposited and pledged with said trustee, Irving J. Kornfield, shall be used by said trustee for the payment of the duly filed, proved and allowed claims of the creditors of Transocean Terminals, Inc. as provided in paragraph

1(a) hereof, and for the payment of costs of administration ordered paid by the above-entitled Court in the Transocean Terminals, Inc. matter, and the balance thereof held as security by said trustee for the payment of any obligation or liability that the above-entitled Court may find due from DeWayne F. Titus, or any of the above-named corporate respondents, to said receiver of Christian & Porter Aluminum, Inc., as provided in paragraph 2 hereof.

Said deposit of said cash fund shall first be security for the payments provided for in paragraph 1 hereof and any excess thereof shall be security for the payments provided for in paragraph 2 hereof and any remainder shall be returned to said DeWayne F. Titus.

4. That said trustee of said bankrupt, Transocean Terminals, Inc., and said respondents herein shall have a right to file objections to any and all claims filed in Transocean Terminals, Inc., bankruptcy proceedings, whether or not previously allowed and/or partial payment has heretofore been made thereon, and have said objections heard and determined by the above-entitled Court. The portion of funds provided for in paragraph 1 hereof for the payment of creditors of Transocean Terminals, Inc., shall be the total of all claims duly proved and allowed after hearing thereof if any objections are made to such claims. Upon any objection to any of such claims, counsel for trustee, bankrupt and respondents may attend and examine all witnesses and produce evidence in connection with such objections.

5. It is further agreed that the said applications for turnover order and order disregarding corporate entities and the orders to show cause issued thereon, and the temporary stays and restraining orders, amended restraining orders, and all other stays and restraining orders issued in each of the above-entitled proceedings against said respondents, shall be dissolved and dismissed and said restraining orders shall be dissolved immediately upon the delivery of the sum of Two Hundred Thousand Dollars ($200,000.) as hereinafter provided to Irving J. Kornfield, trustee. DeWayne F. Titus and respondents agree to dismiss all petitions to review and all petitions filed by them in said proceedings upon the approval of this agreement by said Court; provided, however, anything to the contrary notwithstanding, the application filed by Kerry M. Gough in the matter of Christian & Porter Aluminum Co. shall not be dismissed and it and any further applications filed by the Receiver of Trustee in Bankruptcy of Christian & Porter Aluminum Co. shall be heard and determined by the above-entitled Court.

6. It is further agreed that said respondents shall return the two fire engines to the trustee for disposition after hearing.

7. It is further agreed that Action No. 394505 filed in the Superior Court of the State of California, in and for the County of Alameda, shall be dismissed without prejudice as to defendants therein. This agreement to so dismiss said action as to said defendants is conditional upon the approval of the Board of

Directors of Continental Consolidated, Inc. Said Continental Consolidated, Inc., hereby gives its covenant not to sue Irving J. Kornfield, Thorpe, Foley & Jarvis, and individual members thereof, Milton Maxwell Newmark, Lynn Anderson Koller, Don R. Hammitt, and Gust C. Nikandros provided, however, if any such covenantees shall hereafter commence any action or bankruptcy proceedings or proceedings therein against Continental Consolidated, Inc., as a party or attorney for such party, the covenant shall thereafter be ineffective as to such covenantee. DeWayne F. Titus and said corporate respondents do hereby grant said trustee and his attorneys a full release from any and all claims of every nature they may have against them, either known or unknown, and said DeWayne F. Titus, and each of said corporate respondents, hereby gives and delivers to said Kerry M. Gough both in his capacity as receiver and individually, and his counsel, Robert R. Barton, a covenant not to sue them or any of them for and on account of any cause of action they may have against them as of the date hereof, or upon any claim or cause of action that they or any of them may have in connection with any proceedings in either of the above-entitled bankruptcy proceedings.

8. That DeWayne F. Titus does hereby appoint and designate Gordon W. Nelson as his agent for service of process in any and all proceedings commenced in connection with all matters covered and referred to in this agreement.

9. It is agreed that said trustee shall appeal any order allowing any creditors claims in said Trans-

ocean Terminals, Inc., matter upon the request of the attorney for Transocean Terminals, Inc. or the request of the attorneys for any of said respondents. It is agreed that any party hereto shall have the right of appeal from any order made by the Referee herein with respect to said Christian & Porter proceedings. DeWayne F. Titus and the corporate respondents hereby waive any objection to the jurisdiction of the Bankruptcy Court they may have in the matter of Christian & Porter Aluminum Co., Inc., and hereby consent to the jurisdiction of said Court to determine what obligation or liability they may have to the receiver or trustee of that bankruptcy estate.

10. It is agreed, anything herein to the contrary notwithstanding, that DeWayne F. Titus shall deliver said Three Hundred Thousand Dollars ($300,000.) to Irving J. Kornfield as follows:

(a) The sum of Two Hundred Thousand Dollars ($200,000.) within ten (10) days from the date of the order of the above-entitled Bankruptcy Court approving this settlement agreement. That time is of the essence hereof and, due to said outstanding restraining orders, said DeWayne F. Titus and said corporate respondents require as a special condition herein that this agreement be approved or disapproved by said Court without the delay required by notice to creditors in either of the said Transocean Terminals, Inc., or said Christian & Porter Aluminum Co. bankruptcy proceedings.

(b) The sum of One Hundred Thousand Dollars ($100,000.) within thirty (30) days from the date of

said order approving this agreement. Should DeWayne F. Titus fail to deliver the sum of One Hundred Thousand Dollars ($100,000.) to said trustee within said thirty (30) days form the date of said order it is agreed that said outstanding restraining orders heretofore issued in said two bankruptcy estates may be re-issued against said DeWayne F. Titus and said corporate respondents and remain in effect until said DeWayne F. Titus shall have complied with the provisions of paragraphs 1(a) and 1(b) hereof or said sum of One Hundred Thousand Dollars ($100,-000.) is deposited with said trustee.

It is agreed by said trustee, upon receipt of said sum of money, shall cause the same to be deposited in an interest bearing account or converted into certificates of deposit so that said funds shall be earing interest while being held by said trustee. Any interest so earned shall become a part of such funds for the purposes of this agreement.

11. It is further agreed that in the event the involuntary adjudication of Christian & Porter Aluminum Company is reversed on review or appeal by decision that becomes final all security then held by or for Christian & Porter receiver or trustee hereunder shall be released and returned insofar as Christian & Porter is concerned.

12. Any notice to DeWayne F. Titus may be served upon him by mail addressed care of Gordon W. Nelson, at 1273 Industrial Park Way West, Hayward, California.

13. The covenants and conditions of this agreement shall be binding upon the successors, assigns, transferees, heirs, beneficiaries and/or legatees of all parties.

Above named respondents by their attorneys, McGugin and Nelson

/s/ By W. A. McGugin

/s/ De Wayne F. Titus
De Wayne F. Titus, Individually

/s/ Irving J. Kornfield,
Irving J. Kornfield,
Trustee in Bankruptcy of
Trans-Ocean Terminals, Inc.

Thorpe, Foley & Jarvis and
Milton Maxwell Newmark,
Attorneys for Trustee

/s/ By M. M. Newmark

/s/ Kerry M. Gough
Kerry M. Gough, Receiver in the matter of Christian & Porter Aluminum Co.

/s/ Robert R. Barton
Robert R. Barton, Attorney for Receiver.

Campbell & McFeeters, Attorneys for
Trans Ocean Terminals, Inc., Bankrupt
By Truman F. Campbell

Appendix B

In The United States District Court For The Northern District Of California

In the Matter of Trans Ocean Terminals, Inc., a corporation, Bankrupt.	No. 110194 In Bankruptcy
In the Matter of Christian & Porter Aluminum Co., Bankrupt.	No. 111649 In Bankruptcy

[Filed November 26, 1969]

ORDER AUTHORIZING AND APPROVING COMPROMISE OF CONTROVERSIES

At Oakland, California, in said District on the 24th day of November, 1969:

The petition of Irving J. Kornfield, trustee of the estate of Trans Ocean Terminals, Inc., bankrupt, and of Kerry M. Gough, receiver of the estate of Christian & Porter Aluminum Co., filed herein on the 26 day of November, 1969, requesting that they and each of them be authorized to compromise certain controversies and it appearing that the respondents named in said petition will not make or enter into said stipulation and compromise unless the same be immediately entered into by said trustee and receiver and immediately approved and authorized by order of this

Court, and it further appearing that said stipulation and compromise is advantageous to each of the above entitled estates and that substantial benefits would be lost if any delay were encountered and that it is necessary and essential that said stipulation and compromise be immediately authorized and approved and it appearing, therefore, that no notice of a hearing on said petition should be given and no adverse interest having been represented and that said compromise of said controversies is for the best interest of the above-entitled estates and each of them and that there is good cause for compromise of said controversies upon the terms and provisions contained in said stipulation.

Now, Therefore, on motion of said trustee and receiver,

It Is Ordered, Adjudged And Decreed that said trustee, Irving J. Kornfield, be and he hereby is authorized and empowered to settle and compromise said controversies upon the terms and provisions set forth in said stipulation and that the said compromise and stipulation is hereby authorized, approved, ratified and confirmed.

It Is Further Ordered that said receiver Kerry M. Gough be and he hereby is authorized and empowered to settle and compromise said controversies upon the terms and provisions set forth in said stipulation and that the said compromise and stipulation is hereby authorized, approved, ratified and confirmed.

It Is Further Ordered that all original restraining orders, all amended restraining orders, all other restraining orders heretofore issued in the Transocean

Terminals, Inc., and Christian & Porter Aluminum bankruptcy matters against DeWayne F. Titus and all corporate respondents named in all applications to restrain heretofore filed in each of said matters be, and each of said restraining orders are, hereby set aside, dissolved, and vacated.

It Is Further Ordered that upon the delivery of the sum of Three Hundred Thousand Dollars ($300,000.) by said DeWayne F. Titus to said Irving J. Kornfield, trustee, that said restraining orders shall not be reinstated against any of said respondents and no new or other restraining orders shall be issued against any of said respondents in either of said bankruptcy proceedings.

/s/ Sheridan Downey, Jr.
Referee in Bankruptcy

Appendix C

In The United States District Court For The Northern District Of California

In the Matter of Transocean Terminals, Inc., a corporation, Bankrupt.	No. 110194 In Bankruptcy

[Filed February 9, 1970]

APPLICATION FOR JUDGMENT

To The Honorable Sheridan Downey, Jr., Referee in Bankruptcy:

The application of Irving J. Kornfield respectfully represents:

That applicant is the duly qualified, appointed and acting Trustee in Bankruptcy of the above estate;

That on November 26, 1969, there was filed in these proceedings a Settlement Agreement, a true copy of which is attached hereto and marked "Exhibit A";

That said Agreement was signed by DeWayne F. Titus and provided inter alia that said DeWayne F. Titus agreed to deliver and turnover to applicant the sum of Three Hundred Thousand Dollars ($300,000.00) for the purposes set forth in said Agreement as follows:

Two Hundred Thousand Dollars within ten days from the date of the order of this Court approving said agreement;

One Hundred Thousand Dollars within thirty days from the date of the said Order approving said Agreement;

That on November 26, 1969, this Court did make and file herein its Order Authorizing and Approving Compromise of Controversies, a true copy of which is attached hereto and marked "Exhibit B";

That all material conditions, agreements and undertakings and conditions precedent by other persons than DeWayne F. Titus, his agents and attorneys provided for in said Settlement Agreement have been fully performed;

That said DeWayne F. Titus has failed and refused to deposit or pay over to applicant any part of the Three Hundred Thousand Dollars ($300,000.00) as provided in said Settlement Agreement.

Wherefore, applicant prays for a judgment against DeWayne F. Titus for Three Hundred Thousand Dollars ($300,000.00) and such other and further relief as is meet and proper in the premises.

Dated: February 6, 1970.

Thorpe, Foley & Jarvis and
Milton Maxwell Newmark
Attorneys for Trustee
By Milton Maxwell Newmark

State of California—/ss/
County of Alameda

Irving J. Kornfield, being first duly sworn, deposes and says:

That he is the applicant in the above-entitled action; that he has read the foregoing Application for Judgment and knows the contents thereof, and that the same is true of his own knowledge, save and except as to the matters which are therein stated on his information or belief and as to those matters he believes it to be true.

Irving J. Kornfield

Subscribed and sworn to before me this 9th day of February, 1970.

Milton Maxwell Newmark
Notary Public
Notary Public in and for the County of Contra Costa, State of California

Appendix D

In The United States District Court
For The Northern District of California

In the Matter of Transocean Terminals, Inc., a corporation, Bankrupt.	No. 110194 In Bankruptcy

[Filed February 9, 1970]

ORDER TO SHOW CAUSE

Upon the reading and consideration of the Application for Judgment of Irving J. Kornfield, dated February 6, 1970, and good cause appearing therefor,

It Is Hereby Ordered that DeWayne F. Titus appear before the undersigned Referee in Bankruptcy, at his Courtroom Room 220, Post Office Building, 13th and Alice Streets, Oakland, California, on February 20, 1970 at 3:00 P.M., to show cause if any he may have, why the prayer of the Trustee's hereinabove referred to application should not be granted and for such other and further relief as is meet and proper in the premises.

It is further ordered that service of this order may be made by mailing true copy there of and of the said application for judgment to DeWayne F. Titus c/o Gordon W. Nelson, such mailing to be done this date.

Dated: February 9, 1970

Sheridan Downey, Jr.
Referee in Bankruptcy

Appendix E

In the United States District Court For The Northern District of California

DeWayne F. Titus, Petitioner, vs. United States District Court, Northern District of California, In Bankruptcy, Respondent.	
United States District Court, Northern District of California In the Matter of Transocean Terminals, Inc., a California Corporation, Respondent.	No. C-70 287 RFP
United States District Court, Northern District of California In the Matter of DeWayne F. Titus, Plaintiff, v. Central Valley National Bank, A National Banking Association, Michael G. Rafton, Edward R. Fitzsimmons, et al., Defendants, Respondent.	No. C-70-149 RFP

Order Dissolving Restraining Orders; Dismissing Contempt Proceedings and Stay of Supplemental Proceedings Conditioned Upon Filing of Supersedeas Bond

[Filed March 11, 1970]

Whereas, DeWayne F. Titus, having hereto filed his Petition for Writ of Prohibition and Order to Show

Cause why Judgment Should not Be Vacated; Execution Quashed and Supplemental Proceedings stayed in Action No. C 70 872 and this Court having heretofore issued its Order to Show Cause on February 6, 1970, pursuant to said Petition, and

Whereas, a Judgment was made and entered on December 9, 1969, in favor of Irving J. Kornfield, as Trustee in Bankruptcy in the matter of Transocean Terminals, Inc., a California corporation, Bankrupt, against said DeWayne F. Titus in the total sum of $300,000.00, and

Whereas, said DeWayne F. Titus has filed and served a Petition for Review of said judgment, and

Whereas an Order Supplementing Trustee's Judgment was made and entered in said Bankruptcy proceeding on February 6, 1970, and

Whereas a Petition for Review from said Order Supplementing Trustee's Judgment has heretofore been filed and served by said DeWayne F. Titus, and

Whereas, a Corrected Judgment was made and entered on the 19th day of February 1970, in said bankruptcy proceeding in favor of said Trustee in Bankruptcy and against said De Wayne F. Titus which in part vacated the prior December 9, 1969, Judgment and the February 6, 1970, Order Supplementing Trustee's Judgment hereinabove referred to, and

Whereas, said DeWayne F. Titus has filed and served a Petition for Review from said Corrected Judgment February 19, 1970, and

Whereas, the hearing on the Petition for Writ of Prohibition having come on for hearing before this Court on February 27, 1970, and the Petitioner, DeWayne F. Titus being personally present in Court and being represented by his counsel Gordon W. Nelson and W. A. McGugin, the Trustee in Bankruptcy being represented by his counsel John Thorpe and Milton Maxwell Newmark, and the bankrupt Transocean Terminals, Inc., being represented by its counsel Truman Campbell, and Central Valley National Bank were represented by its counsel Edward R. Fitzsimmons and no other respondents being present that were represented by counsel and the Court being fully advised and the parties having at said February 27, hearing entered into the stipulation embodied by this Order and it having been agreed that the relief granted is authorized pursuant to Section 39 (c) of the Bankruptcy Act, 11 U.S.C. Section 67 (c), and good cause appearing therefor.

It is hereby ordered that DeWayne F. Titus will file with the Clerk of this Court on or before 10 days from date of this Order, a supersedeas bond to be approved by this Court in the sum of $250,000.00 from adequate sureties to indemnify Irving J. Kornfield as Trustee in Bankruptcy in the matter of Transocean Terminals, Inc., a California corporation, from any loss said Trustee may incur pending review and/or appeal of the Corrected Judgment filed in said bankruptcy proceedings on February 19, 1970, against said DeWayne F. Titus in favor of Irving J. Kornfield as Trustee in Bankruptcy of said bankrupt estate, and to pay that portion of said sum of

$250,000.00 as may be required to said Trustee upon said Corrected Judgment becoming final, and all matters required to fix the amount to be paid by Titus under said Corrected Judgment are finally resolved or paid.

It Is Further Ordered That said supersedeas bond will be to bond the Corrected Judgment of February 19, 1970, and any further judgments made and entered in connection therewith and that there will be no further supplemental proceedings by the Trustee in Bankruptcy to enforce said Corrected Judgment or any other Order obtained in connection therewith until said supersedeas bond has been depleted and that upon the exhaustion of the funds provided by said supersedeas bond further supplemental proceedings are hereby authorized if they are deemed necessary by Irving J. Kornfield as Trustee in Bankruptcy in the matter of Transocean Terminals, Inc., to collect sums due and owing or to become due and owing from said DeWayne F. Titus to Irving J. Kornfield as said Trustee in connection with said bankruptcy proceeding.

It Is Further Ordered that any and all contempt proceedings against DeWayne F. Titus which are presently pending before this Court will be stayed 10 days from the date of this Order and will be deemed dismissed without further order of this Court if said DeWayne F. Titus posts the above-referred to supersedeas bond within the period of time heretofore ordered.

It Is Further Ordered that upon the posting of said bond any and all restraining orders issued in said

bankruptcy proceeding will be automatically dissolved without further Order of this Court.

It Is Further Ordered that upon the posting of said supersedeas bond any and all Orders heretofore made in said bankruptcy proceeding in aid of the collection of any and all judgment obtained in said bankruptcy proceeding by said Trustee against said Titus will forthwith be vacated and set aside without further Order of this Court and that for a period of 10 days subsequent to the signing of this Order the Trustee shall not pursue the enforcement of any orders obtained in said supplemental proceeding in aid of collection of judgments against said DeWayne F. Titus.

It Is Further Ordered that the December 9, 1969, Judgment against said DeWayne F. Titus in favor of Irving J. Kornfield in the total sum of $300,000.00 and the February 6, 1970, Order Supplementing Trustee's Judgment against said DeWayne F. Titus in favor of Irving J. Kornfield which were heretofore vacated pursuant to the Order of Corrected Judgment of February 19, 1970, in the Transocean Terminals, Inc., matter were vacated pursuant to due process of law and that the petition for review filed by said Titus will be from the Corrected Judgment of February 19, 1970, and the Petition for Review heretofore filed by Titus from said December 9, 1969 Judgment and February 6, 1970 Order Supplementing Trustee's Judgment are hereby dismissed.

It Is Further Ordered that until said hereinabove referred to supersedeas bond is duly and regularly posted by said DeWayne F. Titus he is hereby re-

strained from transferring any and all of his property with the sole and exclusive exception that he may transfer property to the surety on the supersedeas bond in aid of obtaining said supersedeas bond.

It Is Further Ordered that upon the posting of said bond all orders heretofore made in said bankruptcy matter of Transocean Terminals, Inc. Proceeding No. 110,194 cancelling stock certificates and directing issuance of new certificates in lieu thereof wherein Central Banking System, Inc. was ordered to cancel 5,290 shares of stock outstanding to DeWayne F. Titus and to issue a new stock certificate for said shares to Irving J. Kornfield, Trustee, and directing the Central Valley National Bank to cancel of record all stock certificates and indicia of ownership showing ownership in DeWayne F. Titus of 200 shares of stock of said corporation and to issue to Irving J. Kornfield a new stock certificate for 200 shares of the capital stock of said corporation, be, and the same is hereby, vacated, annulled and set aside.

It Is Further Ordered that all writs of execution heretofore issued in said Transocean Terminals, Inc., a corporation, matter against said DeWayne F. Titus and any of the said corporate respondents therein, and all supplemental proceedings and orders made therein, shall be upon the posting of said supersedeas bond, and they hereby are, vacated, voided, annulled and set aside.

It Is Further Ordered that upon the posting of said bond in said matter by DeWayne F. Titus that all outstanding restraining orders against DeWayne F.

Titus, Transocean Export Packing, Inc., Barbary Coast Properties, Inc., D. & J. Properties, Inc., Alameda Diversified Industries, National Building Components, Inc., Alameda Factors, Inc., Continental Consolidated, Inc., Transocean Enterprises, Inc., Pay Rolls, Inc., Aluminum Extruded Shapes, Inc., All American Machinery Co., Inc., California Western Trucking, Coast Corrugated Container, Inc., Harbor Steel, Inc., ABC Container, Inc., Pacific Wood and Metal, Bayshore Lift, Transocean Managing, Inc., and each of them, be and they hereby are dissolved as of the date of the said posting of said supersedeas bond.

/s/ Robert H. Peckham,
Judge, United States District Court

Approved as to Form:
Thorpe, Foley & Jarvis and
Milton Maxwell Newmark
Attorneys for Trustee
By .....

Approved as to Form:
Gordon W. Nelson and
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